IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 790 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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VIJAYBHAI KESARISINGH ZALA - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR JM PANCHAL for Appellant(s) : 1
MR RC KODEKAR, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE MD SHAH

Date : 24/04/2007

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1.This appeal under Sec.374 of the Code of Criminal Procedure, 1973 ('the Code' for short) has been filed by the appellant-

original accused, who has been charged and tried for the offences punishable under Sections 376 and 306 of the Indian Penal Code in Sessions Case No.126 of 1998 and at the end of trial, he has been convicted to suffer RI for life and to pay fine of Rs.20,000/-, in default, to suffer RI for a further period of two years, for the offence under Section 376 of IPC and also to suffer RI for ten years and to pay a fine of Rs.10,000/-, in default, to suffer RI for a further period of two years for the offence under Section 306 of IPC by the learned Additional Sessions Judge, Kheda at Nadiad, vide judgment and order dated 28-7-1998. Both the sentences were ordered to run concurrently.

2. The case of the prosecution in short is that on 18-11-1997, the deceased, resident of Village Hathigha-ni-Muwadi, Taluka Kapadwanj, was attending to her natural call at about 10.00 a.m. in the nearby agricultural field when her mother was not in the house. At that time, the accused Vijaybhai Kesrising Zala caught hold her and committed rape on her. Though she resisted, she could not escape. She was threatened with dire consequences if she reported the incident to anybody and, therefore, she did not inform the incident to anybody. Since she could not tolerate the

said incident, she poured kerosene and enlightened the match stick on her due to which, she sustained grievous burn injuries and, therefore, her mother Janakben took her to Sheth J.B.Mehta General Hospital, Kapadwanj. She was given primary treatment by Dr.Jagrutiben Budhabhai Patel, Medical Officer on duty at said hospital. Said incident was reported by Dr.Jagrutiben to PSO, Pratapsing Vajesing, Kapadwanj Police Station. PSO informed Police Constable, Amarsinh Hamirbhai, to visit the hospital. Amarsinh therefore came to the hospital and recorded statement of victim. He also sent yadi Exh.8 to Executive Magistrate for recording the dying declaration of the victim. In pursuance of that, Executive Magistrate, Mohammad Ishub Vohra, reached and inquired about the fit mental condition of the victim for recording the dying declaration. Since Dr.Jagrutiben Patel declared the victim to be in a fit state of mind, dying declaration of the victim was recorded by the Executive Magistrate in question-answer form wherein she disclosed the entire incident. She also disclosed that since it was concerning the reputation of herself and her family, she committed suicide by pouring kerosene and enlightened match stick on her. Since her physical condition

was found to be very serious, she was shifted to Civil Hospital at Ahmedabad. However, she succumbed to her injuries on 22-11-1997. Police Constable, Amarsinh Hamirbhai, made arrangements for inquest panchnama and also for performing post mortem on the dead body of the deceased. Thereafter, complaint of the complainant has been recorded which was registered with Antarsuba Police Station I.C.R.No.62 of 1997 for the offences punishable under Sections 376 and 306 of IP Code. Further investigation has been handed over to PSI, Kalubhai Harjibhai Desai of Antarsuba Police Station. Thereafter, he recorded statements of mother of the victim and other persons. He also drew panchnama of scene of offence as well as panchnama of place wherein she poured kerosene. He also collected muddamal from the scene of offence. The investigating agency also arrested the accused and sent him for medical examination to Dr.Nareshbhai Sutaria. Dr.Sutaria collected the samples of pubic hair, saliva, nails and blood of the accused. Similarly, Dr.Jagarutiben Patel had collected samples of blood, saliva, hair and vaginal swabs etc. of deceased. Police seized the clothes worn by the deceased as well as the accused and sent all the articles to the FSL for analysis. On receipt of FSL and post mortem

reports, same were kept in investigating file. At the end of investigation, he submitted the charge sheet into the Court of learned Judicial Magistrate (First Class), Kapadwanj.

3.As the offences alleged against the accused were exclusively triable by the Court of Sessions, learned Judicial Magistrate (First Class), Kapadwanj, committed the case to the Court of Sessions, Kheda at Nadiad. On receiving the same, it was numbered as Sessions Case No.126 of 1998 and transferred into the Court of learned Addl. Sessions Judge, Kheda at Nadiad. On production of the accused, learned Addl.Sessions Judge framed charge against the accused at Exh.2. The accused pleaded not guilty to the charge and prayed for trial.

4.To prove the charge against the accused, prosecution examined following witnesses namely, P.W.1, Mohammad Ishub Ismail Vohra Exh.15; P.W.2 Dr.Jagrutiben Budhabhai Patel, Exh.10; P.W.3, Dr.Hasumatiben Ranchhodray Patel at Exh.16; P.W.4, Dr.Nareshbhai Popatbhai Sutaria, Exh.19; P.W.5 Amarsinh Hamirbhai Exh.22; P.W.6, Janakben Khodabhai at Exh.25; P.W.7, Chimanbhai Raijibhai Exh.26 and P.W.8, Kalubhai Harjibhai Desai, Exh.29, I.O. Prosecution also placed reliance upon various other documentary evidence also viz.,

yadi written by PSO to Executive Magistrate Exh.8; dying declaration recorded by the Executive Magistrate Exh.9; yadi written by PSO to Medical Officer of Sheth J.B.Mehta General Hospital, Kapadwanj, X-ray plates of deceased Exh.10; injury certificate of deceased Exh.13; yadi to Medical Officer by PSO, Kapadwanj Town Police Station Exh.14; post mortem report of deceased Exh.18; medical certificate concerning accused Exh.21; statement of deceased dt. 18-11-1997 recorded by Hamirsingh, P.W.5, Exh.23; FIR Exh.24; panchnama of the scene of offence where deceased was subjected to rape Exh.27; panchnama of place where deceased suffered burn injuries Exh.28; panchnama of seizure of clothes worn by the accused Exh.31; forwarding letter to FSL Exh.32; FSL receipt for having received articles Exs.33 and 34 and FSL report Exh.35.

5. On submission of closing pursis Exh.36 by the prosecution, learned Judge recorded further statement of the accused under Sec.313 of Cr.P.C. qua incriminating question. The defense of the accused was of denial in nature.

6. Thereafter, after hearing the learned counsel appearing for the respective parties, learned Addl. Sessions Judge, Kheda at Nadiad, delivered the impugned judgment whereby the

appellant accused was convicted as aforesaid, which is giving rise to the present appeal.

7. We have heard learned counsel for the appellant, Mr.J.M.Panchal and learned APP, Mr.R.C.Kodekar for the respondent-State.

8. It has been mainly argued by Mr.Panchal that the appellant is innocent and has been falsely involved into the crime in question. If the entire evidence of the prosecution is appreciated in its correct perspective, no offence either under Sec.376 or under Sec.306 of IP Code is made out against the appellant.

9. According to Mr.Panchal, there are contradictions in the dying declaration Exh.9 recorded by the Executive Magistrate and the dying declaration taken down by the police. In the dying declaration Exh.9 recorded by the Executive Magistrate, there are over-writings and corrections and since it creates doubt in the mind of all concerned, it should not be relied upon. It has been contended that thumb impressions of the deceased in the dying declaration were concocted as both the thumbs of deceased were burnt. In the dying declaration taken down by Constable, Amarsinh, and the medical papers as well as post mortem note, it has been contended that the deceased was critical and was unable to speak and her thumbs were burnt. Evidence of prosecution witnesses suggest that the

deceased received 100% burn injuries of 1st and 3rd degrees and hence, she was not in a conscious state of mind to give her dying declaration. Taking us through the evidence of Dr.Jagrutiben, P.W.2, Exh.10, it is contended that in view of the contradictory versions in the evidence of the witnesses, the evidence of Dr.Jagrutiben does not inspire any confidence. In view of contradictory versions in the dying declarations, both the dying declarations should be discarded. The evidence of Janakben Khodabhai Parmar, P.W.6, Exh.25, who is the mother of the deceased, would go to show that these dying declarations are recorded on the basis of statements of relatives of the deceased and they are not the statements of deceased and hence also, it is contended that no reliance should be placed on both the dying declarations for holding the appellant guilty of serious offence punishable under Secs.376 and 306 of IP Code.

10.It is further contended that even the panchnamas of place of incident and physical condition of the deceased as well as the accused do not corroborate the say of the prosecution. It is also contended that no external or internal marks of injury were found on the body of the deceased. The doctor has also opined that there was an old rupture

of hymen found on the deceased which indicated sexual intercourse at an earlier point of time. It has also been contended that the victim did not shout nor did she raise any alarm while the alleged rape was committed by the accused and hence, it should be presumed that she was a consenting party. According to him, the place of incident is very near to the house of the deceased and hence, if there was any shout, it can easily be heard by all the people nearby. As the deceased was a consenting party, she might have felt that some immoral act has been committed by her and since she was unable to show her face before her relatives, she committed suicide and for which, the appellant cannot be held guilty. According to him, there are no other evidence connecting the appellant accused with the crime in question in absence of any eye witness for first or second incident. In view of the aforesaid, it is prayed that the appellant may be acquitted by setting aside the impugned judgment and order of conviction and sentence. Alternatively, it has been argued that if the Court believes the dying declaration to be trustworthy and free from doubt, then also, the sentence awarded by the court below is very harsh and, therefore, he has prayed for reduction of sentence. He has

relied upon the following reported judgments:

i)(2006)1 Supreme Court Cases (Cri) 577 in the case of State of M.P. Vs. Bane Singh;

ii)(2006)1 Supreme Court Cases (Cri) 1 in the case of Dinesh Alias Buddha Vs. State of Rajasthan; and

iii)(2006)1 Supreme Court Cases (Cri) 762 in the case of Shyama Vs. State of Rajasthan.

iv)Learned APP, Mr.Kodekar, on the other hand, has vehemently argued that the case against the appellant accused has been proved by the prosecution beyond reasonable doubt. He placed reliance on the evidence of Dr.Jagrutiben, P.W.2, Exh.20, who treated the deceased on being brought having sustained 100% burn injuries. Dr.Jagrutiben had recorded the history of the deceased at Exh.15 wherein the entire facts including the sexual assault committed by the appellant on the deceased while she was attending to her nature call has been described. Relying upon the certificate issued by Dr.Jagrutiben for recording the dying declaration, it is contended that the deceased was in a fit mental condition in giving the dying declaration and hence, she made an endorsement on the yadi Exh.8 sent to Executive Magistrate, Mohammad Ishub Vohra. Both the evidence of Executive Magistrate and Dr.Jagrutiben support the say of the

prosecution. Dying declaration is further corroborated by the independent evidence of FSL Exh.35 connecting the accused with the crime in question. It is further contended that there are independent evidence of three witnesses i.e. Dr.Jagrutiben, P.W.2, Amarsingh Hamirsingh P.W.5 and Mohammadbhai Vohra, P.W.1. They are officers, who acted in course of their official duties. Since their evidence are trustworthy inspiring confidence, their evidence should be believed. On the contrary, their evidence are sufficient to hold the appellant accused guilty and base conviction. It has been further contended that an old rupture of hymen found on the deceased does not necessarily mean that the deceased was a consenting party nor was she habituated in sexual intercourse. If she was a consenting party, she would not have committed suicide. The deceased did not raise any alarm does not also mean that she was not sexually assaulted by the appellant accused. When the case against the appellant accused has been proved beyond doubt by the prosecution by way of independent evidence on record, the judgment and order of conviction may not be interfered with.

11. We have gone through the oral as well as the documentary evidence shown to us by the

learned counsel for the respective parties as well as the judgment impugned. We have also gone through the judgments relied upon by the learned counsel for the appellant. Keeping in mind the principles laid down by the Apex Court in the aforesaid reported judgments, we proceed further.

12. It is established from the evidence on record that deceased committed suicide by sprinkling kerosene on her. The reason for committing suicide has been narrated in detail by the deceased herself in the history Exh.15 recorded by Dr.Jagrutiben, P.W.2 at Exh.20, when she was taken to the hospital. In the said history, the deceased had clearly stated that when she went out for attending to her nature call, the appellant accused caught hold her and committed rape on her. Since the mental condition of the deceased was good, Dr.Jagrutiben made an endorsement for recording the dying declaration and in pursuance of which, dying declaration of the deceased was recorded by the Executive Magistrate. Apart from the independent evidence of Dr.Jagrutiben, there are testimonies of other independent persons namely, Amarsinh Hamirbhai, Police Constable, who recorded the statement of the victim on reaching the hospital after receiving telephonic vardhi from the doctor

as well as Mohammadbhai Vohra, Executive Magistrate, who recorded the dying declaration of the deceased. They came in contact with the offence in question as part of their official duties. They being independent persons, their evidence are convincing inspiring confidence in the mind of the Court and hence, we accept the same to be credit-worthy evidence. Apart from the above, FSL report Exh.35 also is in favour of the prosecution. As per the opinion of FSL, human blood and semen on the pubic hair of the accused as well as the vaginal swabs taken from the genetical organ of the deceased link the accused with the crime in question.

13.A contention has been raised by the learned counsel for the appellant that it was a case of consent. In this regard, we have gone through the evidence on record along with the cross examination as well as three dying declarations of the deceased, first before Dr.Jagrutiben thereafter before Executive Magistrate by way of dying declaration and thereafter before Police Constable Amarsinh Hamirbhai apart from the statement given in between by the deceased to her mother. It is established from the aforesaid that the accused committed forceful sexual intercourse upon the victim against her consent and since

it was affecting her prestige and also of her family members, she committed suicide by pouring kerosene and enlightened match stick on her. In view of this, we do not accept the contention raised by the learned counsel for the appellant that the victim was a consenting party. If she was a consenting party, nothing further would have happened more particularly when it is not the case that somebody had seen the incident of sexual assault and hence she had committed suicide.

14. Evidence on record also shows that at the time of incident, deceased was aged about 15 years. This is the opinion given by the doctor and that too also, without the expert opinion of Radiologist to the effect that she was above 16 years of age. Moreover, there was no direction given by anybody for conducting ossification test. Keeping in mind the evidence available on record, we believe the age of the victim as 15 years at the time of incident.

15. As far as other contention regarding physical and mental condition of the deceased is concerned, there are evidence on record supporting the say of the prosecution. When the doctor has given specific opinion in writing and endorsement to that effect has been made after examining her, we are unable to accept the contention raised by the

learned counsel for the appellant that the deceased was not in fit state of mind to give her dying declaration.

16.We therefore hold that the appellant has committed rape on the victim against her will and since it is affecting her prestige and that of her family members, she poured kerosene and enlightened match stick on her and committed suicide. Since the case against the appellant accused has been proved beyond reasonable doubt, we are of the opinion that this appeal deserves to be dismissed.

17.As far as reduction in the quantum of punishment is concerned, we have gone through the judgments relied upon by the learned counsel for the appellant and we accept the principles laid down in those reported judgments by the Apex Court. We however say that this is a peculiar case wherein such a heinous crime has been committed by the appellant accused on the victim and court below has considered every aspects of the matter while awarding sentence. We also concur the same and do not think it fit and proper to reduce the sentence looking to the peculiar facts and circumstances of this case.

18.This appeal is accordingly dismissed.

(R.P.DHOLAKIA,J.)

(M.D.SHAH,J.)

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